No. 20481



# In The United States Court of Appeals For The Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

CARROLL-NASLUND DISPOSAL, INC., RESPONDENT

**On Petition for Enforcement of an Order of the National Labor Relations Board**

## BRIEF FOR RESPONDENT

ARNOLD ORDMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
MARCEL MALLET-PREVOST,
*Assistant General Counsel,*
ALLISON W. BROWN, JR.
HAROLD B. SHORE,
*Attorneys,*
*National Labor Relations Board*
WESTON & WESTON,
*Attorneys for Respondent.*

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## AUTHORITIES CITED

Cases:

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## JURISDICTION

Respondent considers the sole issue before this Court to be jurisdiction, and the jurisdiction of the Board and the Court is, therefore, opposed.

## STATEMENT OF THE CASE

The Trial Examiner found that the Respondent, Carroll-Naslund Disposal, Inc., is an Idaho corporation, doing business in the City of Lewiston, Idaho, a city with a population of approximately 12,000, and that in the operation of its business of the collection

and disposal of garbage, it operated in an adjoining area continguous to the City of Lewiston, known as Lewiston Orchards, a suburb, and that the corporation consisted of Virgil Carroll, Hugh Naslund, and Virgil Carroll's wife, President, Vice President and Secretary-Manager, respectively. The company employs about seven employees. Carroll owns stock in a company referred to as X-L Refuse, Inc., a Washington corporation, engaged in collection and disposal of garbage in the City of Spokane, Washington, a distance of approximately 120 miles.

Naslund works with the other employees, in addition to handling his supervisory duties.

There is no inter-change of equipment or personnel between Carroll-Naslund and X-L, and there is no evidence in the record with reference to amounts of purchases, or equipment, tires, trucks, gasoline, oil, etc. by either company. The record, however, does show that there is no common billings for these items or for other items, and that different insurance companies carry the public liability insurance for each company, and separate and independent audits of the books of each company are made. According to witness Carroll, X-L was not financed by Carroll-Naslund corporate funds.

The City of Lewiston, under its responsibility to collect and dispose of garbage, awarded a contract to Carroll-Naslund, the contract prescribing the collection of garbage in the residential and commercial areas. From this contract, the Respondent received a net sum of approximately $36,000.00, a gross sum of approximately $45,000.00, from the residents of the city. From its commercial accounts in Lewiston the Respondent receives approximately $22,000.00. Some of the com-

mercial customers are themselves engaged in interstate commerce. The fees from such customers who are themselves engaged in commerce either on the basis of $50,000.00 annually from out of the state, or sales of $500,000.00 a year as a retailer, amounts to approximately $7,000.00. As a part of its agreement with the City the respondent receives an additional fee of approximately $1,600.00 for maintaining a city dump.

The Respondent collects and disposes of garbage for Lewiston Orchards, the suburb of Lewiston, for which it collects approximately $11,000.00 annually, and from the Lewiston Orchards Irrigation District, for which the Respondent is performing land fill operations, approximately $5,000.00.

The City of Clarkston, Washington, across the river from Lewiston, has its own garbage operation, but the Respondent performs some services in a suburb, called Clarkston Heights, outside the corporate limits of the City of Clarkston, and in doing this work for the individual customers in this area, the Respondent receives approximately $3,000.00.

The annual income of X-L is approximately $47,000.00. Of this sum, $25,000.00 is on a Government contract with the Fairchild Airforce Base, which is in the Spokane area. The other items are from collections in the communities surrounding Spokane.

The Trial Examiner held that the Respondent and X-L were not a single employer, and also held that the employees of the Respondent were not employees of the City of Lewiston. The remaining question was whether or not the Respondent as a single employer was engaged in interstate commerce, or if its opera-

tions had an effect upon interstate commerce, as required by the Act.

## ARGUMENT

While it is admitted that statutory jurisdiction exists by reason of Carroll-Naslund's position in the neighboring town of Clarkston Heights, the one truck used in this operation grosses only $3,115.00. The one truck is engaged in the collection of garbage for individuals in the residential district and according to the Trial Examiner would be covered by the de minimis ruling. The facts also show that the collection of garbage and disposal of the same is all performed in Clarkston, there is no back-haul into Lewiston.

The findings of fact by the Trial Examiner, therefore, shows that the amount of indirect inflow was not only de minimis, but far below the $50,000.00 yardstick suggested for a non-retail establishment, and that the $45,000.00 worth of services performed for the City of Lewiston should not be counted in computing the jurisdictional requirements. The Trial Examiner was clearly correct in his finding that garbage collection in the city is "about as local an activity as can be conceived." The Trial Examiner, therefore, adopted the more recent and proper rule that the Board and the Court should look to the over-all and general purpose of the employer's operation. Is the employer's operation set up to serve the local needs of a small community, if so and considering the facts in this case, can it be said that an interruption in this Respondent's business would in any way place a burden upon or effect interstate commerce? Obviously the answer is no.

The Board in reversing the Trial Examiner relied almost entirely on the Board case of *Siemons Mailing Service*, 122 NLRB 81. This case was decided on November 14, 1958. However, on the same date the Board in the *Carolina Supplies and Cement Company* clarified and modified its policy and ruling, and in this case referred to the *Siemons case*, and the *Guss v. Utah Labor Relations Board*, 353 US 1, and in reversing former decisions and establishing a definite, clear-cut rule stated that either as to a group of stores, or as to a single store, the test will be a required $500,000.00 per annum gross volume.

In the *Carolina Supplies and Cement case* the Board reviewed all its policies and decisions from the beginning of the Act, and concluded that its former policy and rulings were not only confusing and required considerable time consuming efforts in determining inflow and outflow, both direct and indirect, but that it would be more expedient and faciltate the handling of cases to establish an over-all requirement that the retail store or service establishment must do a gross of $500,000.00 per annum to be covered by the Act.

The Board stated:

"Ever since the enactment of the National Labor Relations Act in 1935 the Board has consistently held to the position that it better effectuates the policies of the Act and promotes the prompt handling of cases not to exercise its jurisdiction to the fullest possible extent under the authority delegated to it by Congress."

"The Board has chosen this case to set forth the revised standard to be applied in all future and pending cases involving retail enterprises.

[*Revised Standards Involving Retail Enterprises*]

The Board has decided that it will assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and *which do a gross volume of business of at least $5000,000 per annum.* The Board will apply this standard to the total operations of an enterprise whether it consists of one or more establishments or locations, and whether it operates in one or more States.

[*Outflow-Inflow Standards Abandoned—Gross Volume of Business Test Adopted*]

"In adopting this standard the Board has departed from its past practice of also utilizing outflow and inflow standards in aid of its jurisdictional determinations with respect to retail enterprises.

"The Board has decided to apply only a gross volume of business standard to such enterprises. The $500,000 standard chosen by the Board should, in its opinion, reasonably insure that jurisdiction will be asserted over all labor disputes involving retail enterprises which tend to exert a pronounced impact upon commerce."

*Carolina Supplies & Cement Co., 122 NLRB 17.*

The National Labor Relations Board has usually followed, and to some extent adopted the rulings and decisions under the Fair Labor Standards Act as to the exemption for an establishment set up to serve a local community and local needs, and if the Fair Labor Standards Act held the establishment to be retail, the National Labor Relations Board usually follows the decision.

Following the 1949 amendment to the Fair Labor Standards Act the Courts, and particularly the United

States Supreme Court, has adopted the rule that enterprises or establishments set up to serve purely local needs, and almost completely controlled by local rules and laws and serving primarily the needs of the community, should be considered retail and under the jurisdiction of the State, and not the Federal Government. This position is set out in *Mitchell v. Zachary*, 362 US 310, in which Justice Frankfurter stated:

> "For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national concern.***"

> "Furthest removed from 'commerce' is employment not 'in' production 'for' commerce but in an activity which is only 'related' to such production***"

This position is also followed in the case of *Wirtz v. Modern Trash Moval, Inc.* Cert. den., 323 F.2d 451 (1963). This case is closely analagous to the instant case and involved the handling and disposition of trash by a concern similarly situated.

These decisions are also followed in *Goldberg v. Sorvis*, 294 F.2d 841, and *Mitchell v. T. F. Taylor Fertilizer Works*, 233 F.2d 284.

It is urged by the General Counsel that the Respondent has no right to defend this Petition, since the Respondent did not file Exceptions to the Intermediate Report. We believe it is a well established rule that the question of jurisdiction may be raised at any time, and we also submit to the Court that since the decision by

the Trial Examiner was favorable to the Respondent, and since this decision held that the Board was without jurisdiction, there would be little reason or cause for the Respondent to file Exceptions to the Report.

## CONCLUSION

In conclusion, the Respondent contends that under the facts in this case, the Court is without jurisdiction, and that the case should, therefore, be dismissed.

DATED: This 9th day of February, 1966.

WESTON & WESTON
By Eli A. Weston
Attorneys for Respondent
711½ Bannock Street
Boise, Idaho

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Eli A. Weston
One of the Attorneys for
Respondent.